(3)

No. 06-589

In the Supreme Court of the United States

CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
APPELLANT

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM FOR THE FEDERAL ELECTION COMMISSION

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QUESTION PRESENTED

Whether the three-judge district court correctly held that appellant's as-applied constitutional challenge to the federal statutory prohibition on the use of corporate treasury funds to finance "electioneering communications" is not currently justiciable.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 15
Conclusion 28

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Mineta*, 534 U.S. 103 (2001) 26
Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) 6
Buckley v. *Valeo*, 424 U.S. 1 (1976) 4
Christian Civic League of Me., Inc. v. *FEC*, 433 F. Supp. 2d 81 (D.D.C.) 10, 11, 12, 20, 26
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 14, 16
FEC v. *Beaumont*, 539 U.S. 146 (2003) 3, 6
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 3, 4
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 3
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 17
Fox v. *Board of Trs. of SUNY*, 42 F.3d 135 (2d Cir. 1994) 19
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) 16
Golden v. *Zwickler*, 394 U.S. 103 (1969) 13

Cases–Continued: Page

Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990) 13, 16, 17
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 19
McConnell v. *FEC*, 540 U.S. 93 (2003) ... 2, 4, 5, 6, 7, 10, 26
Murphy v. *Hunt*, 455 U.S. 478 (1982) 14, 17
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999) 26
North Carolina v. *Rice*, 404 U.S. 244 (1971) 16
Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972) 3
Renne v. *Geary*, 501 U.S. 312 (1991) 13, 25
Rescue Army v. *Municipal Ct.*, 331 U.S. 549 (1947) 25
Southern Pac. Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 16
Spencer v. *Kemna*, 523 U.S. 1 (1998) 17, 23
Weinstein v. *Bradford*, 423 U.S. 147 (1975) 17
Wisconsin Right to Life, Inc. v. *FEC*:
126 S. Ct. 1016 (2006) 2, 7, 27
No. 04-1260 (D.D.C. Dec. 21, 2006) 15, 27, 28

Constitution, statutes, regulation and rule:

U.S. Const.:
Art. III 13, 19
Amend. I 13
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81:
§ 201(a), 116 Stat. 88 ..... 5, 6

Statutes, regulation and rule–Continued: Page

§ 203, 116 Stat. 91 ..... *passim*
§ 403(a)(1), 116 Stat. 114 9
§ 403(a)(4), 116 Stat. 114 ..... 15, 23
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 2
2 U.S.C. 431(9)(A)(i) 4
2 U.S.C. 431(17) 4
2 U.S.C. 434(f)(3)(A)(i) (Supp. IV 2004) 6
2 U.S.C. 434(f)(3))B)(i)-(iv) (Supp. IV 2004) 6
2 U.S.C. 437c(b)(1) 2
2 U.S.C. 437d(a)(7) 2
2 U.S.C. 437d(a)(8) (Supp. IV. 2004) 2
2 U.S.C. 437f 2
2 U.S.C. 438(a)(8) (Supp. IV. 2004) 2
2 U.S.C. 438(d) (Supp. IV 2004) 2
2 U.S.C. 441a(a)(1)(C) (Supp. IV 2004) 21
2 U.S.C. 441b 4
2 U.S.C. 441b(a) 3
2 U.S.C. 441b(b) 5
2 U.S.C. 441b(b)(2) (Supp. IV 2004) 2, 5
2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004) ... 3, 6
2 U.S.C. 441b(b)(4)(A)-(C) 3
26 U.S.C. 501(c)(4) 8
11 C.F.R. 114.10 ..... 4, 8
Fed. R. Civ. P. 65(d) 24

Miscellaneous: Page

Bureau of Corporations, Elections & Commission, State of Maine, *Election Results* (visited Dec. 28, 2006) <http://www.maine.gov/sos/cec/elec/prior1st.htm> 18

152 Cong. Rec. S5554 (daily ed. June 7, 2006) 12

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MOTION TO DISMISS OR AFFIRM FOR THE FEDERAL ELECTION COMMISSION

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-14a) is unreported. A prior opinion of the district court is reported at 433 F. Supp. 2d 81.

JURISDICTION

The decision of the three-judge district court was issued on September 27, 2006. A notice of appeal was filed on October 6, 2006, and the jurisdictional statement was filed on October 26, 2006. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns the "electioneering communication" provision contained in Section 203 of the Biparti-

san Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91. The provision prohibits corporations from using their general treasury funds to pay for any "electioneering communication," defined as a communication that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. IV 2004)). This Court has sustained BCRA § 203 against a facial constitutional challenge, see *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), but has held that the provision is subject to as-applied challenges, see *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL I*) (per curiam). Appellant filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to appellant's own proposed broadcast advertisements. The three-judge district court ultimately dismissed appellant's claims. J.S. App. 1a-14a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and (d) (Supp. IV 2004); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the ex-

press purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210; 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. IV 2004). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88

(2 U.S.C. 434(f)(3)(A)(i) (Supp. IV 2004)).[1] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications from that fund. See 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004).

3. In *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162; see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S.

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[1] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 116 Stat. 88 (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. IV 2004)). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. In *WRTL I*, this Court considered an as-applied constitutional challenge to BCRA § 203's prohibition on the use of corporate treasury funds to finance electioneering communications. The three-judge district court in that case had construed this Court's decision in *McConnell* as foreclosing all such as-applied challenges. 126 S. Ct. at 1017-1018. This Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. *Id.* at 1018. The Court remanded the case to the district court to consider the merits of the plaintiff corporation's as-applied challenge in the first instance. *Ibid.* On December 21, 2006, the three-judge

district court in that case held that BCRA § 203 is unconstitutional as applied to the advertisements in question. See p. 27, *infra*.

5. Appellant Christian Civic League of Maine, Inc., is a nonprofit, nonstock Maine corporation. J.S. App. 3a. Appellant's complaint asserts that it is tax-exempt under Section 501(c)(4) of the Internal Revenue Code (26 U.S.C.), and that it is interested in "laws protecting traditional marriage" and other public issues. Compl. paras. 16, 20. Appellant asserts that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. Compl. para. 22.

Appellant's complaint in the instant case was filed on April 3, 2006. Appellant alleged that it planned to run a particular radio advertisement "between May 10 and early June." Compl. paras. 11, 13. The text of the advertisement (known as the "Crossroads" advertisement) is as follows:

> Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the

> Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

J.S. 1 n.1. Because Senator Snowe was a candidate in a primary election that took place June 13, 2006, the effect of specifically mentioning Senator Snowe under BCRA's electioneering-communications provisions was that the advertisement in question could not have been financed with appellant's treasury funds if it was broadcast in Maine between May 14, 2006, and June 13, 2006.

The complaint in this case further alleged that appellant "intends to run materially similar grass-roots lobbying ads * * * when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Maine." Compl. para. 16. Appellant alleged that it "is concerned about a range of issues * * * that regularly have and will become issues in the legislative and executive branch." *Ibid.* Appellant alleged that, "[b]ecause the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a strong likelihood that [appellant's] need to broadcast grass-roots lobbying ads will again coincide with the electioneering communications blackout periods." *Ibid.* Appellant sought preliminary and permanent injunctive relief against enforcement of BCRA § 203 with respect to both the specific advertisement referenced in the complaint and any other "electioneering communications by [appellant] that constitute grass-roots lobbying." Compl. 13. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

6. On May 9, 2006, the district court denied appellant's request for a preliminary injunction against enforcement of BCRA's restrictions on the financing of the "Crossroads" advertisement. See *Christian Civic League of Maine, Inc.* v. *FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006) (*CCL I*).[2] The court concluded that "each of the four preliminary injunction factors counsels against the grant of the requested injunction." *Id.* at 87.

In holding that appellant had failed to establish a likelihood of success on the merits, the district court observed that BCRA "does not bar the proposed advertisement; it only requires that [appellant] fund it through a political action committee." *CCL I*, 433 F. Supp. 2d at 88. The court found that the "ability to form and administer separate segregated funds . . . has provided corporations . . . with a constitutionally sufficient opportunity to engage in express advocacy." *Ibid.* (quoting *McConnell*, 540 U.S. at 203). The court further explained that appellant could have financed the advertisement with corporate treasury funds if it had used a non-broadcast medium or had refrained from clearly identifying Senator Snowe. See *ibid.*

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[2] In a footnote, the district court observed that appellant's request for a preliminary injunction extended beyond the "Crossroads" advertisement to "encompass 'any electioneering communications by [appellant] that constitute grass-roots lobbying.'" *CCL I*, 433 F. Supp. 2d at 84 n. 1. The court observed, however, that appellant had "fail[ed] to define 'grassroots lobbying' (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction." *Ibid.* The court concluded on that basis that appellant's "request for the broader preliminary injunction [was] unwarranted." *Ibid.* The remainder of the court's opinion therefore addressed appellant's request for preliminary injunctive relief only insofar as that request pertained to the "Crossroads" advertisement. See *ibid.*

The district court also noted that appellant's advertisement

> appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*. * * * [T]he advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection.

CCL I, 433 F. Supp. 2d at 88-89 (citation omitted). The court observed that a newsletter published by appellant had "already sounded an enthusiastic note regarding a potential challenger to Senator Snowe." *Id.* at 89. In addition, the court concluded that appellant's proposed "grassroots lobbying" exception to the coverage of BCRA § 203 "would seriously impair the government's compelling interest in protecting the integrity of the electoral process" because "candidates or their allies could easily schedule an issue for 'legislative consideration' during the run-up to an election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement." *Ibid.*

The district court also held that appellant had failed to demonstrate that it would suffer irreparable harm absent a preliminary injunction because, notwithstanding BCRA's restrictions on "electioneering communications," the various alternative means the court had described were available for communicating appellant's views concerning the Marriage Protection Amendment. *CCL I*, 433 F. Supp. 2d at 89. The court further concluded that issuance of the requested preliminary in-

junction would substantially injure the Commission and would disserve the compelling public interest in the enforcement of BCRA. *Id.* at 90.

7. On May 12, 2006, appellant filed its jurisdictional statement and moved for expedited disposition of its appeal. In its Motion to Expedite and Consolidate Briefing (Mot. to Expedite) (at 2) appellant stated that a Senate vote on the Marriage Protection Amendment was expected to occur "on or about June 5, 2006." The motion further stated that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." *Ibid.* The FEC opposed that motion, arguing that expedited consideration was unwarranted even though "the question whether the district court should have issued a *preliminary* injunction is likely to become moot before the Court can resolve the merits of [appellant's] current appeal." FEC Opp. to Mot. to Expedite 5.

On May 15, 2006, this Court denied appellant's motion to expedite the appeal. 126 S. Ct. 2062. On June 7, 2006, a vote to invoke cloture on the proposed Marriage Protection Amendment failed in the United States Senate, effectively terminating Senate consideration of the measure. See 152 Cong. Rec. S5554 (daily ed.). On October 2, 2006, this Court dismissed as moot appellant's appeal from the denial of its request for a preliminary injunction. 127 S. Ct. 336.

8. On September 27, 2006, the district court dismissed appellant's complaint in its entirety. J.S. App. 1a-16a.

a. Insofar as appellant challenged the constitutionality of BCRA § 203 as applied to communications other than the "Crossroads" advertisement, the district court held that appellant's claims were "not ripe and/or too

speculative and hypothetical to be justiciable." J.S. App. 2a; see *id.* at 4a-9a. The court explained that appellant "bears the burden of clearly alleging and ultimately proving that the non-Crossroads claims are justiciable." *Id.* at 5a. The court observed, however, that appellant "has admitted that it has no current plans to broadcast any advertisements about any issue." *Ibid.*

The district court further explained that, under Article III of the Constitution, federal courts are precluded from issuing "opinion[s] advising what the law would be upon a hypothetical state of facts," J.S. App. 6a (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)), and may resolve constitutional questions only "in the context of a specific live grievance," *ibid.* (quoting *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969)). The district court also relied (see *id.* at 7a) on *Renne* v. *Geary*, 501 U.S. 312 (1991), in which this Court held that a First Amendment challenge to a state ban on political-party endorsements of candidates for non-partisan offices was unripe because the plaintiffs had failed to allege a present intention to endorse any specific candidate and had not compiled an adequate factual record as to any such endorsement. The district court found that appellant similarly lacks any present intention to broadcast any particular advertisement, and that appellant had not developed any factual record about what such an advertisement might say, how it might be created, or how it might be financed or broadcast. See J.S. App. 7a-8a. The court concluded:

> What [appellant] really seeks via its non-Crossroads claims is for the court to promulgate a rule exempting all "grass roots lobbying"—a phrase [appellant] never defines—from the Act's electioneering communications provision. This court, however, decides

> present disputes based on particular facts—and especially so where faced with an as-applied challenge, as here. Absent a concrete dispute, this court lacks jurisdiction.

Id. at 9a (footnote omitted).

b. With respect to the "Crossroads" advertisement, the district court held that appellant's claims were "moot and not saved by the 'capable of repetition, yet evading review' exception to that doctrine." J.S. App. 2a; see *id.* at 10a-13a. The court found that the "Crossroads" claims were moot because "the occurrence of the June 2006 Senate vote on the relevant legislation leaves the court without power to provide effectual relief." *Id.* at 10a.

The district court noted that the "capable of repetition, yet evading review" exception to mootness principles applies "only in exceptional situations," J.S. App. 11a (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983)), and it concluded that appellant had failed to satisfy either prong of the applicable test, *id.* at 11a-13a. With regard to the "capable of repetition" prong, the court noted that appellant was required to establish a "reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining party." *Id.* at 11a (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982)) (quotation marks omitted and emphasis added by district court). The court explained that adjudication of appellant's constitutional claim would require it to assess the legal significance of an unusual combination of circumstances, and it found that this "confluence of specifics" was unlikely to recur. *Id.* at 12a. The court also held that any such future claims would not necessarily evade review because a challenge filed substantially in advance of the relevant

election would "stand a strong chance of gaining full appellate review in light of the Act's requirement that the judiciary expedite consideration of such challenges." *Id.* at 13a (citing BCRA § 403(a)(4), 116 Stat. 113).

ARGUMENT

Appellant contends (J.S. 8-24) that its as-applied constitutional challenge to BCRA § 203 is "capable of repetition yet evading review," and that its suit therefore remains justiciable, notwithstanding the fact that the Senate vote on the Marriage Protection Amendment took place in June 2006. The three-judge district court rejected that argument, holding that no substantially similar dispute involving appellant is likely to recur, and that any such dispute that might arise could potentially receive full appellate consideration if suit were filed sufficiently in advance of the relevant election. Those holdings are correct. This Court therefore should dismiss the appeal as moot or affirm the judgment of the district court. In the alternative, the Court may wish to hold the jurisdictional statement pending the possible filing and disposition of any jurisdictional statements in *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260 (D.D.C. Dec. 21, 2006) (*WRTL II*).

1. a. When it sought expedited consideration of its appeal of the district court's denial of a preliminary injunction, appellant represented to this Court that a Senate vote on the Marriage Protection Amendment was expected in early June and that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." 05-1447 Mot. to Expedite 2. The Senate terminated its consideration of the Marriage Protection Amendment in June 2006, and appellant has identified no reason to believe that any subsequent Senate vote on

that measure will occur in the foreseeable future. Moreover, because appellant chose not to run the "Crossroads" advertisement during the 30-day period before the June Senate primary election in Maine, it cannot be subject to any potential future Commission enforcement action whose validity might turn on the determination whether BCRA's financing restrictions are constitutional as applied to that advertisement.

Because no live controversy exists concerning the constitutionality of BCRA § 203 as applied to the "Crossroads" advertisement, appellant's claim with respect to that advertisement is moot and no longer suitable for judicial resolution. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) (explaining that the "Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence"). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis*, 494 U.S. at 477 (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Id.* at 477-478.

b. This Court has recognized an exception to mootness principles for situations that are "capable of repetition, yet evading review." See *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). "[T]he capable-of-repetition doctrine applies only in exceptional situations," *Lyons*, 461 U.S. at 109, "where the following two circumstances [are] simultaneously present: (1) the

challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Spencer* v. *Kemna*, 523 U.S. 1, 17-18 (1998) (citations and internal quotation marks omitted) (brackets in original) (quoting *Lewis*, 494 U.S. at 481). For an alleged wrong to be considered "capable of repetition," "there must be a 'reasonable expectation' or 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978). This Court "has never held that a mere physical or theoretical possibility was sufficient" to satisfy this test; if that were enough, "virtually any matter of short duration would be reviewable." *Murphy*, 455 U.S. at 482.

As the district court correctly held (J.S. App. 11a-13a), appellant's constitutional claim with respect to the "Crossroads" advertisement is not "capable of repetition" within the meaning of this Court's decisions, since appellant has failed to demonstrate "a reasonable expectation or demonstrated probability that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (citation and internal quotation marks omitted). Because the instant suit involves an as-applied rather than a facial challenge to BCRA § 203, a broad range of idiosyncratic circumstances would potentially bear on the correct disposition of appellant's claim. Those circumstances include appellant's decision to run a broadcast advertisement about the Marriage Protection Act just before a federal primary election in Maine; the group's determination to

finance the advertisement with corporate funds, even though it could use a separate segregated fund; and the group's decision to identify a Senate candidate in the advertisement, even though it could encourage grassroots action without doing so. Although appellant need not show that "the precise facts related to the Crossroads Ad" (J.S. 10) are likely to be replicated, any future dispute must at least involve a substantially similar factual setting in order for the two cases to present the "same controversy."[3]

Whatever the precise nature of the showing that may be required in this context, appellant cannot satisfy the applicable standard on the record in this case. At his deposition, appellant's longtime executive director testified that he could not recall any prior occasion on which appellant had run a broadcast advertisement that had identified a federal office holder. See FEC Opp. to Mot. for Prelim. Inj. 11-12. Appellant later introduced evidence (see J.S. 3-4) that in July 2004 it had run a radio advertisement identifying Senators Snowe and Collins. There was no Senate election that year in Maine, however, and the primary election for other federal offices was held on June 8, 2004. See Bureau of Corporations, Elections & Commissions, State of Maine, *Election Results* (visited Dec. 28, 2006) <http://www.maine.gov/sos/cec/elec/prior1st.htm>. Thus, the only broadcast advertisement mentioning a federal office holder that

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[3] Contrary to appellant's contention (J.S. 10), the district court did not hold that a dispute is capable of repetition only if the "precise facts" of the case are likely to recur. Rather, the thrust of the court's analysis was that the combination of circumstances involved in this case was sufficiently unusual that a materially similar controversy is unlikely to arise again. That conclusion is correct for the reasons stated at pp. 18-22, *infra*.

appellant has been shown to have financed did not fall within BCRA's definition of an "electioneering communication."

Nor has appellant demonstrated any likelihood that its advertising practices will change in the future. In its complaint, appellant alleged in general terms that it "intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition period[s] before" other federal primary and general elections. Compl. para. 16. In his deposition, however, appellant's executive director testified that appellant had no plans to run any advertisements other than the "Crossroads" advertisement, and that the group had "no other issues selected for future campaigns." J.S. App. 6a. Appellant's counsel likewise represented that the group had "no concrete plans to do an ad" other than the "Crossroads" advertisement. *Ibid.* Absent any demonstrated likelihood that appellant will again seek to finance substantially similar advertisements during the periods covered by BCRA § 203, appellant's "bare statement of intention is insufficient to escape mootness." *Fox* v. *Board of Trs. of SUNY*, 42 F.3d 135, 143 (2d Cir. 1994); cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (holding that "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury" required for Article III standing).

The anomalous circumstances under which this case arose reinforce the conclusion that the current controversy is unlikely to recur. Record evidence indicates that appellant's expressed intent to finance the "Crossroads" advertisement reflected a hastily arranged effort to facilitate a constitutional challenge to BCRA § 203.

Appellant filed this lawsuit ten days after an official of the Colorado group Focus on the Family sent an e-mail to leaders of a number of organizations, including appellant's executive director. That e-mail forwarded a message from counsel offering to seek a federal court injunction at no charge on behalf of "any group" that planned a "grass roots lobbying" advertisement during the electioneering-communication period in its State, adding that "[t]his may even involve an appeal to the U.S. Supreme Court (which would result in a landmark ruling)." FEC Opp. to Mot. for Prelim. Inj. Exh. B. The e-mail explained that the recipients had been selected "because [they were] in [States] that could be affected by McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. Senators who are on the ballot." Before receiving that communication, appellant had given no consideration to financing broadcast advertising during 2006. See *id.* at 7. About one hour after receiving the e-mail, however, appellant's executive director agreed to "run an ad in that period of time mentioning Olympia Snowe." *Id.* Exh. C. Focus on the Family subsequently provided appellant with the text of the "Crossroads" advertisement that is at issue in this case. *Id.* at 8.

The funding mechanism chosen by appellant reinforces the inference that the planned advertising campaign was primarily a means to engender litigation. When the complaint was filed, appellant lacked the $3992 needed to air the "Crossroads" advertisement on local radio. See FEC Opp. to Motion for Prelim. Inj. 9-10; *CCL I*, 433 F. Supp. 2d at 86. Appellant subsequently represented that a single donor had agreed to provide the necessary funds. See *ibid.* That donation would have been within the $5000 limit on individual

contributions to a separate segregated fund if appellant had chosen to establish one, see 2 U.S.C. 441a(a)(1)(C) (Supp. IV 2004), and the individual donor could simply have financed the advertisement himself without the need for appellant to act as a conduit. Because the availability of those alternatives would be directly relevant to the resolution of appellant's as-applied constitutional challenge, the absence of any reason to believe that comparable circumstances will recur in the future further undermines appellant's contention that it will likely confront the "same controversy" again.

c. Appellant appears to contend (J.S. 11-13) that it has satisfied the "same controversy" requirement by avowing an intent to finance future advertisements that (i) constitute "grassroots lobbying" and (ii) fall within BCRA § 203's definition of "electioneering communication." Because appellant refuses to advocate any specific definition of the term "grassroots lobbying," its contention that the "Crossroads" advertisement qualifies (and that appellant intends to finance other "grassroots lobbying" communications in the future) provides no cogent basis for concluding that the "same controversy" is likely to recur.[4] And if every dispute about the

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[4] Appellant identifies two possible definitions of the term "grassroots lobbying," see J.S. 24-26 nn.27-28, but carefully refrains from endorsing either one. The statement in the "Crossroads" advertisement that, "*[u]nfortunately*, your senators voted against the Marriage Protection Amendment two years ago," J.S. 1 n.1 (emphasis added), would take that advertisement outside the two proposed "grassroots lobbying" exceptions that appellant identifies. See J.S. 25 n.27 (stating that the criteria for the first exception "are not met if the communication includes any reference to * * * the candidate's record or position on any issue"); J.S. 25 n.28 (providing, as one condition for the second exception, that, "[i]f the communication discusses the candidate's position or record on the matter, it does so only by quoting the candi-

constitutionality of BCRA § 203's restrictions on the financing of "electioneering communication[s]" were deemed to present the "same controversy," the distinction between facial and as-applied challenges that this Court recognized in *WRTL I* would effectively be eliminated. See J.S. App. 8a.

d. Appellant suggests (J.S. 10, 13 n.14) that election-related disputes necessarily or at least presumptively satisfy the "capable of repetition yet evading review" exception to the rule that moot cases are non-justiciable. This suit, however, differs in a fundamental way from the cases on which appellant relies. When a plaintiff demonstrates an intent to participate in electoral processes on an ongoing basis, a court may have reasonable grounds for concluding that any injury the plaintiff suffers during one election will be repeated during later electoral cycles. The gravamen of appellant's as-applied challenge, by contrast, is that it *lacks* the intent to influence federal elections, but that its purported issue advocacy was impeded by the fortuity that the Senate vote on which it sought to comment coincided with a Maine Senate primary. In light of appellant's disavowal of any intent to engage in electoral advocacy, there is no sound reason to conclude on the record before this Court that appellant will again wish to finance advertisements mentioning candidates for federal office during the brief pre-election periods covered by BCRA § 203.

e. Even if a substantially similar controversy were to recur in the future, appellant's as-applied challenge would not necessarily evade review. See J.S. App. 13a. This suit was filed in April 2006, just six weeks before

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date's own public statements or reciting the candidate's official action, such as a vote, on the matter").

the start of the applicable electioneering-communication period. The district court noted that a suit brought substantially in advance of the relevant election would "stand a strong chance of gaining full appellate review in light of [BCRA's] requirement that the judiciary expedite consideration of such challenges." *Ibid.*; see BCRA § 403(a)(4), 116 Stat. 114. Indeed, even the massive *McConnell* litigation took less than 21 months from the time complaints were filed until the final decision of this Court. There is no reason to suppose that the time between the filing of a far simpler suit like this one and the occurrence of an election would be "always so short as to evade review." *Spencer*, 523 U.S. at 18.

Appellant contends (J.S. 20-22) that the communicative activities in which it wishes to engage cannot feasibly be planned well in advance of the proposed communications. The proposed constitutional amendment discussed in the "Crossroads" advertisement was introduced in early 2005, however, and appellant appears to have been aware at that time of Senator Snowe's likely candidacy in the 2006 election and her position on the amendment. See FEC Opp. to Mot. for Prelim. Inj. 13-14; Plaintiff Reply in Support of Mot. for Prelim. Inj. 2. Appellant's contention that it must react quickly to emerging legislative events is further belied by the substantial indications that the proposed "Crossroads" advertisement was conceived as a device to generate litigation. See pp. 19-21, *supra*.

2. As the district court correctly held, appellant's claims with regard to advertisements other than the "Crossroads" advertisement are "not ripe and/or too speculative and hypothetical to be justiciable." J.S. App. 2a. Appellant's continuing failure to articulate a clear and administrable definition of the term "grass-

roots lobbying" underscores the absence of any focused dispute between the parties and the impropriety of any injunctive or declarative relief incorporating that term. See Fed. R. Civ. P. 65(d) ("Every order granting an injunction * * * shall be specific in terms * * * [and] shall describe in reasonable detail * * * the act or acts sought to be restrained."). And even if appellant had articulated a clear proposed legal standard, its failure to describe with any precision the sort of advertisements it intends to finance means that there is not even a hypothetical set of facts to which the standard can be applied.

In *Renne*, this Court relied on comparable factors in holding unripe the plaintiffs' constitutional challenge to restrictions on political speech. The plaintiffs in that case had challenged a state-law provision barring political parties from endorsing candidates for nonpartisan office. This Court stated:

> We also discern no ripe controversy in the allegations that respondents desire to endorse candidates in future elections * * * . [Plaintiffs] do not allege an intention to endorse any particular candidate, nor that a candidate wants to include a party's or committee member's endorsement in a candidate statement. We possess no factual record of an actual or imminent application of [the state-law restriction] sufficient to present the constitutional issues in clean-cut and concrete form. We do not know the nature of the endorsement, how it would be publicized, or the precise language [state officials] might delete from the voter pamphlet. To the extent [plaintiffs] allege that a committee or a committee member wishes to "support" or "oppose" a candidate

> other than through endorsements, they do not specify what form that support or opposition would take.

501 U.S. at 321-322 (citations and internal quotation marks omitted).

Similarly here, appellant has not identified the candidate(s) it may wish to identify in future communications, the legislative issues those communications might discuss, the timing or location of the advertisements, the nature of the electoral environment in which the advertisements might air, or the impediments to using financing methods (*e.g.*, a separate segregated fund) that would not trigger BCRA § 203's restrictions. In the absence of such information, appellant's challenge to possible future applications of BCRA § 203 does not "present the constitutional issues in 'clean-cut and concrete form.'" 501 U.S. at 322 (quoting *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 584 (1947)).

3. Appellant requests (see J.S. i, 24-29) that this Court consider the merits of its contention that BCRA § 203 is unconstitutional as applied to its "Crossroads" advertisement in particular and to "genuine grassroots lobbying" in general. That course would be inappropriate even if this Court were to conclude that appellant's claims are currently justiciable. Because the district court did not resolve the merits of appellant's constitutional claims, there is no pertinent ruling for this Court to review. And because only minimal discovery occurred before the district court denied preliminary injunctive relief in May, the existing evidentiary record is inadequate for this Court to adjudicate appellant's as-applied challenge. For those reasons, the second and third questions presented in the jurisdictional statement are not properly before this Court, which "ordinarily 'do[es] not decide in the first instance issues not decided

below.'" *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (quoting *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999)).

To the extent that the evidentiary record has been developed, that record does not support appellant's claim for a constitutional exemption from BCRA § 203's generally applicable restrictions on the financing of electioneering communications. See *CCL I*, 433 F. Supp. 2d at 87-89 (holding, in connection with the denial of preliminary injunctive relief, that appellant had failed to establish a substantial likelihood of success on the merits of its as-applied constitutional challenge). Evidence obtained in connection with the motion for a preliminary injunction indicates that the Crossroads advertisement was prompted by the then-imminent Senate primary election and had the potential to affect electoral outcomes. See pp. 11, 19-21, *supra*. The evidence further indicates that appellant easily could have publicized its message through other lawful means and could have financed it through a separate segregated fund. See pp. 20-21, *supra*.

The Court in *McConnell* recognized that BCRA's electioneering-communication restrictions can be applied constitutionally to communications that, like the "Crossroads" advertisement, discuss legislative concerns but can also be expected to influence federal elections. The Court concluded that BCRA's minimal impact on such advertising was constitutionally acceptable because corporations and unions could "finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *McConnell*, 540 U.S. at 206. Appellant seeks a quasi-legislative carve-out that both Congress and the Court

in *McConnell* have considered and rejected, and that ignores the carefully balanced set of benefits and burdens that the Act applies to corporations and unions and their separate segregated funds. In any event, because the underlying as-applied claims in this case are nonjusticiable and therefore were not addressed by the district court on the merits, this case does not provide an occasion for the Court to address the validity of such a carve-out.

4. For the foregoing reasons, the decision of the three-judge district court is correct and does not warrant plenary appellate review in this Court. On December 21, 2006, however, a different three-judge panel of the District Court for the District of Columbia issued its decision in *WRTL II*, on remand from this Court's decision in *WRTL I*. The court in *WRTL II* considered a constitutional challenge to the application of BCRA § 203 to three broadcast advertisements that the plaintiff had proposed to air in 2004. See slip op. 2-6. The district court held that the plaintiff's challenge was "capable of repetition, yet evading review," and was therefore justiciable, see *id.* at 9-13, and that BCRA § 203's financing restrictions are unconstitutional as applied to the advertisements in question, see *id.* at 14-26. With respect to the mootness issue, the court in *WRTL II* expressed disagreement with the holding of the three-judge district court in the instant case. See slip op. 13 n.14. On December 29, 2006, the FEC and intervenor-defendants filed notices of appeal to this Court of the district court's ruling in *WRTL II*.

Thus, if a jurisdictional statement is filed in *WRTL II* and this Court notes probable jurisdiction, the Court will be required to determine whether the plaintiff's suit is "capable of repetition, yet evading review." Because

of the unique circumstances presented by each case —including the fact that the plaintiff in *WRTL II* has engaged in much more extensive broadcast issue advertising in the past than has appellant—the Court's resolution of the mootness-issue in that case will not necessarily control the outcome here. Nevertheless, the Court may wish to hold the jurisdictional statement in the instant case pending the possible filing and disposition of any jurisdictional statements in *WRTL II*.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction, or the judgment of the district court should be affirmed. In the alternative, the jurisdictional statement should be held pending the filing and disposition of any jurisdictional statements in *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260 (D.D.C. Dec. 21, 2006), and then disposed of as appropriate.

Respectfully submitted.

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